# DOCUMENTS

IN RELATION

*To the Senate bill No. 68, to settle contested claims that have arisen under the pre-emption laws.*

MAY 15, 1838.

Submitted by Mr. YOUNG, and ordered to be printed

CHICAGO, ILL., *August* 7, 1836.

SIR: As agent and attorney of the undersigned, (one of whom is my sister-in-law,) I am authorized and requested to file a caveat against the issuing of any patents for all or any part of section No. 9, in township No. 3 north, of range No. 23 east, of the fourth principal meridian of land lying in the county of Milwaukie, and Territory of Wisconsin; section 9, aforesaid, lies at the mouth of Root river, and there have recently been six floats laid upon it, and we understand the owners of the floats have started an agent to Washington with a large amount of funds to obtain patents before those whose improvements have been floated shall have time to file their objections.

We respectfully object to said patents being issued, and appeal from the decision of the register and receiver of the land office at Green Bay, both in the allowance of said pre-emptions, and in the issuing and location of said floats, on the following grounds:

1st. The district of land in question was not subject to pre-emption or floats; the title to this land was acquired by virtue of a treaty made at Chicago the 26th day of September, A. D. 1836, between the United States and the Chippewa, Ottawa, and Pottawatamie Indians. By the 2d article of this treaty the Indians were to retain possession of the country north of the boundary line of the State of Illinois for three years. This treaty was not ratified until the 21st day of February, 1835; it is, therefore, respectfully submitted, whether the pre-emption act of the 19th June, 1834, can apply to lands acquired from the Indians by a treaty not ratified until February, 1835, and by the terms of which treaty the Indian title, and right of possession, does not become extinguished until the 26th day of September next.

2d. The pre-emptions out of which the floats issued were not legal. Several of the persons who obtained the pre-emptions were, we are informed, *half-breed Indians*, and not entitled to the rights and privileges of pre-emptors, especially upon the very lands ceded by their nation to the United States.

3d. The floats have been located upon the improved lands of the undersigned, as will appear by the endorsed affidavits; and we understand that

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it has been decided by the President that floats cannot be laid upon improved and cultivated lands.

4th. We charge that the officers of the Green Bay land district had, at the time of the allowance and location of said floats, an interest in the same, and are ready to prove this fact; and request that their proceedings may be scrutinized by the Commissioner of the General Land Office.

Will you please inform me, on the receipt of this, whether the patents have been issued for said section, or any part of it, and the decision you may make upon the objections which we have herein interposed.

We are, with great respect, your obedient servants,

PAUL KINGSTON,
ENOCH THOMPSON,
STEPHEN CAMPBELL,
MINERVA CARPENTER,
By JAMES KENZIE,
*Their attorney.*

To the COMMISSIONER
*Of the General Land Office.*

P. S.—Another objection which may be made is that some of the floats question originated in the Green Bay land district, and are located on his tract, which lies in the Milwaukie land district.

J. KENZIE.

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The enclosed affidavits are informal; they were drawn in a hurry by persons unacquainted with legal proceedings, and are not duly authenticated, owing, no doubt, to the want of knowledge of the claimants that any further certificates were necessary. Further evidence, establishing fully the facts in the case, will be transmitted to your office as soon as possibly obtained.

Yours,
J. KENZIE.

The affidavits appended to the foregoing caveat and letter were as follows:

WISCONSIN TERRITORY, }
*Milwaukie county.* }

We, the undersigned, do solemnly swear that Gilbert Carpenter did settle, with his family, early in the year of 1835, on the northwest quarter of section 9, township 3 north, range 23 east; and that in said year he, said Carpenter, died, and his widow has lived on said quarter in 1836, and has caused to be made on the same considerable improvements, to wit: 5 or 6 acres cut, and the brush heaped; also a dwelling house. We also know that the southwest quarter is also improved, the north fraction by Enoch Thompson and Joel Sage, and the south fraction by Stephen Campbell.

WILLIAM LEE,
PAUL KINGSTON.

AUGUST 2, 1836.

Sworn to and subscribed before me, this 2d August, A. D. 1836.
BENJAMIN FELCH, *Justice.*

WISCONSIN TERRITORY, }
*Milwaukie county.* }

Personally came before me, Benjamin Felch, a justice of the peace for said county and Territory, Harrison K. Fay and John T. Kingston, of said county and Territory, who, being duly sworn, depose and say: That, about the middle of January, in the year 1835, they were employed by Paul Kingston, of said county and Territory, to build a house, and did build a house, for said Kingston, on the southeast fractional quarter of section nine, township three north, range twenty-three east, of the fourth principal meridian in the said county and Territory; and, likewise, said deponents say that said Kingston continued to improve and occupy the said fractional quarter section until he moved thereon with his family, about the 17th June, 1835, and on which he continued to reside, with his family, to the present time, improving and cultivating the same; and further these deponents say not.

HARRISON K. FAY,
JOHN T. KINGSTON.

Sworn to and subscribed before me, this 26th day of July, A. D. 1836.
BENJAMIN FELCH, *Justice.*

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*Chicago treaty of 27th September* 1833. *Case of pre-emption to the Notta-wa-se-pe reserve in Michigan, O. P. Lacy, agent; and of Powell, Grignon, Nevill, Gleason, and L. and J. Vinx, at Root river, Wisconsin.*

GENERAL LAND OFFICE,
*Solicitor's Bureau, February* 21, 1837.

SIR: In these cases, referred to me for my opinion as to the day when the treaty took effect, and also when these lands became subject to pre-emptions, under act of June, 1834, I have the honor to state that the *treaty* took effect on the 21st February, 1835, the day it was ratified by the President and Senate of the United States. The general rule is, that treaties are obligatory upon the parties from the date of the signatures; upon third parties from the date of the ratification. This rule only applies when the contracting powers have neglected to stipulate the day on which the treaty is to go into operation. In the treaty in question, the *parties* stipulated as follows: "*This treaty, after the same shall have been ratified by the President and Senate of the United States, shall be binding on the contracting parties.*" The Senate on their part ratified, by two resolutions, one dated 22d May, 1834, the other 11th February, 1835. No part of the treaty as yet became obligatory upon any *body;* something more had been contracted for, to wit: ratification by the *President.* He gave that by proclamation the day I have stated; it is the only ratification this treaty ever received from *him.* This opinion shows that no pre-emption to these lands was granted by the act of 19th June, 1834. There could have been no possession under that act; it was *Indian* land in 1834, of which no white man could be possessed, could be a "settler or occupant," agreeably to the act. The pre-emptions claimed are all void, and must be disallowed. The error in the arguments of counsel arises from the assumption of premises that are unsound. They should not have overlooked the stipu-

lation of the treaty, and reasoned upon the subject as though the contract of the parties had not given a day, from which only the treaty was to bind them. Having done this, the contract cannot be construed so as to make it cover, by relation, the time that elapsed between its date and ratification. Where the rule of construction as to date is given by *contract* all other rules must yield to it. The cases cited by Mr. Carroll, Fisher *vs.* Hamden, and Hylton's lessee *vs.* Brown, are both cases arising under the treaty of *peace* with Great Britain, of 1782, in which no stipulation was made as to the day when the treaty was to become obligatory. They are not inconsistent with the rule I have laid down. I conceive they are consitent with, and in support of it. It will dispose of the pre-emptions in Michigan, and two of the floats laid on section 9, at *Root river*, to wit: the floats of Lewis Vinx, and Jacques Vinx. The floats being void, the location is void also.

The cases of Powell, Grignon, Nevill, and Gleason, are cases of floats located or attempted to be located on section 9, at the mouth of Root river, Wisconsin Territory. The question arises, were the lands "*public lands*" subject to location? What was understood by the term as used in the act of 1834? Was it not such lands as the United States owned? of which the *freehold* and right of occupancy was in them? As to the soil and jurisdiction, the United States have always owned them; their title has been perfect, save only the Indian right of *occupancy*. This they contracted for at Chicago, and the contract is, that their right shall be absolute (three years after the date of the treaty) or sooner, if convenient for the Indians to remove west of the Mississippi. *See last clause of 2d article*, stipulating that the Indians shall retain possession *north* of Illinois, without molestation or interruption, and under the protection of the *laws* of the United States. This *protection*, among other things, is a prohibition to intrusions by white persons, on lands which they have the right to possess; the protection of their possessory right of the only title which they ever owned, as is said by the Supreme Court. The Indian title is not then extinguished, and the law of 1834 does not authorize a sale of these *lands*. Some of the Indians yet remain on the cession; while any so remain they all have the free and uninterrupted right to every part and parcel of the territory, and no white man can say, you shall keep off from section *nine*, or from any other portion of it. The able counsel urge that a legal title may pass to the pre-emptors subject to this reservation to the Indians; that if the Indians do not complain of the interference, no other person can plead it. They are mistaken. A patent issued without authority is void. If the Executive should patent the entire (public) domain, his patent would be worth less than so much blank parchment; the title would still be in the United States, unless the law authorized *the sale*. So in these cases, if the law does not authorize the sale until the Indian right is extinguished, patents will be void if issued, and being void, other persons *than Indians* will plead and *prove* the Indian right of occupancy, to show that it is void. The final result will be, that the parties would lose their title and improvements, and only gain the vexation of a ruinous and expensive law suit. It is the best thing for them, however thankless the task, to stop the proceedings here. If patents have issued to others in like cases (as the counsel intimate) timely notice should be given them, so that the endless scenes of litigation that will otherwise *surely come* may be avoided. I have purposely omitted many points urged by counsel, having no time to spend on unnecessary work. If my decision shall operate prejudicially

to the applicants, I can only regret it. The farther one is deluded in a stray path, the greater is his misfortune. But arguments upon the hardships of the law should be addressed to Congress. We cannot sell lands where they have not given us the power. My opinion is not "*novel*;" that word is more properly applicable to the decision made by the officers at Green Bay, and the construction put upon the law and treaty, by counsel. The Attorney General decided that the pre-emption act did not authorize the sale of the lands while the Indians retained the right to remain upon it. The fact that the Government stipulated in this treaty for the right to survey and sell that part of the territory lying in Michigan before the final removal of the Indians, should have been a sufficient notice to every person, that without such contract Government did not claim the right to sell the lands, while the possessory right was with the Indians.

I am, very respectfully,
Your most obedient,
M. BIRCHARD, *Solicitor.*

To JAS. WHITCOMB, Esq.,
*Commissioner.*

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GENERAL LAND OFFICE,
*Solicitor's Bureau, March* 14, 1838.

SIR: Pursuant to the order of the Secretary of the Treasury, and at your request, I have re-examined the papers in the case of Powell *et al.*, for the purpose of ascertaining whether any new doubt arises on the question presented to the Attorney General, as stated in his letter to the Secretary, bearing date the 12th instant; and I beg leave to state that I do not find that any material question has ever been presented which is not substantially decided by my reports. I took the position that the act of 1834 did not authorize a sale of any of the land in question. Surely that covered the whole ground, both the original pre-emptions and floats. No other law authorizes the location of a float.

I presume Mr. Butler's allusion is to some question that was propounded by counsel, after the papers were placed in his hands, probably by parol. Whatever it may have been, so long as I adhere to my former opinion, I shall believe it totally immaterial.

I am, &c.,
M. BIRCHARD,
*Solicitor.*

To JAMES WHITCOMB, Esq.

P. S.—The cases of Powell, Grignon, Nevill, and Gleason, were floats granted to settlers on lands which were liable to pre-emption. I did not receive or act upon the proof which was offered to show that they were improperly allowed; but, admitting their correctness, I decided that they could not be located on land to which an original pre-emption was denied to actual settlers.

M. B.

SOLICITOR'S BUREAU,
*March* 23, 1837.

SIR: I have reviewed my former report, No. 37, and believe that the general conclusion therein expressed is correct. Many of the remarks which Mr. Carroll seems to think immaterial, in one sense may appear as such; that is they are not so apparently applicable to his clients' cases as they were to other cases disposed of by that report. The material difference between myself and the able counsel is as to the effect of the law, and not what is the law. The case of the United States *vs.* Arredondo *et al.*, 6 Peters, 743, I think, is in accordance with all the decisions quoted, and to me it seems to quiet those cases. The court there say, (speaking of the treaty of cession by Spain:) "but the ratification by the United States was in February following, and the treaty did not take effect till its ratification by both parties operated like the delivery of a deed, to make it the binding act of both." I apply this rule to the treaty in question, because it is a decision that is "authority." It is one that a lawyer may comprehend. What is the effect of the delivery of a deed? It is in law the first moment that it operates as a conveyance. Before delivery by the grantor it passes not a shadow of title. An execution levied between the *date* and *delivery* will hold the land, because the title is in the grantor at the time of the levy, and if the deed is not delivered at all, it never becomes a conveyance. So of the treaty: until ratified the title was in the Indians; the deed might, when delivered, relate back to its date, as between the parties, but not where that relation will affect the rights of third persons. The law under which the claimants attempt to obtain this land, passed June 19, 1834. The treaty by which the United States acquired the Indian title was ratified in the following February. I think the land *was not public land* at the passage of the law, but was Indian land. In the Quapaw case, (cited heretofore,) the Attorney General said the pre-emption act of 1814 did not authorize the sale of lands ceded by the treaty of 1818, because the Indian title was not extinguished at the passage of the law. I only apply the same principle to those cases. These floats arise under the act of 19th June, 1834, and although the opinion of Mr. Butler may not be so apparently applicable to them, (and I only indulge the remark because counsel have made the distinction,) it nevertheless settles the controversy. The opinion of March 19, 1836, simply decides that the title of the United States to certain lands reserved by Indians in the treaties therein mentioned, did not pass by the reservation, and nothing more. The opinion of April 15, 1836, decides that an alien may be a pre-emptor where the local laws authorize him to hold title to real estate.

If I understand Mr. Butler, his decisions do not overthrow my conclusion, but sustain it. The cited opinion of the Secretary of the Treasury was given under the Choctaw treaty of 1831, and the pre-emption acts of 5th April, 1832, and 2d March, 1833. The facts are different from the facts in these cases. The 18th article of the treaty reads as follows: "*The United States shall cause the lands hereby ceded to be surveyed, and surveyors may enter the Choctaw country for that purpose, conducting themselves properly, and disturbing or interrupting none of the Choctaw people. But no person is to be permitted to settle within the nation, or the lands to be sold before the Choctaws shall remove.*" By the third article the Choctaws agreed to remove, "*the one-half in the fall of* 1831, *and* 1832," and the residue in the "*fall of* 1833." The facts before Mr. Woodbury were

*that the applicants had settled on lands which the Choctaws had abandoned, and "who expressed a wish against their removal."*

The law under which these settlers claimed passed after the ratification of that treaty. At its passage the individuals were housekeepers on the lands claimed, the Indians having permitted them to settle there. No doubt in my mind exists, as to the power of Congress to grant them the lands. It is for that part of the opinion of Mr. Woodbury, which says "*I consider the lands as public lands after the cession*," *&c.*, that this case is quoted; an opinion certainly not necessary to determine the case before him, and, as would appear by the action of the then President and Secretary of War, (who ordered the public troops to remove all white persons from the Choctaw cession,) not concurred in by the Executive. In justification of my opinion, and to show that that part of the Secretary's opinion was a hasty *obiter dictum*, and not the true reason of that decision, I cite the last clause of the circular of 1834, explanatory of the act reviving the act of 29th May, 1830, which reads—"*the instructions do not apply in any manner to the tracts of country recently obtained by the Government from the Choctaws*," *&c.* Mr. Secretary McLane also decided the same way, April 24, 1833. His written opinion is now on file. The act of 19th June, 1834, is a revival of the act of 29th May, 1830, which prohibits the sale of any land under any of its provisions "*which may have been appropriated for any purpose whatever.*" By a *public treaty*, which is a *paramount law*, the lands *in question* were appropriated to the exclusive use of the Indians, for three years from the date of the treaty, and that time had not elapsed when the act of 19th June, 1834, expired by its own limitation.

I am, most respectfully,
Your obedient servant,
M. BIRCHARD, *Solicitor.*

To JAMES WHITCOMB, Esq.,
*Commissioner.*

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*Copy of the opinion of the Attorney General.*

ATTORNEY GENERAL'S OFFICE,
*May* 3, 1836.

SIR: In answer to the questions proposed in the communication of the Commissioner of the General Land Office, enclosed to me in your letter of the 29th ultimo, I have the honor to state that in my opinion none of the lands ceded by the Quapaw treaty of the 24th of August, 1818, are or ever have been subject to the pre-emption claims under the section of the act of the 12th April, 1814.

It seems to me very clear, that this section applies only to lands which, prior to the date of the law, have been *settled and cultivated consistently with the rightful claims of others.* The lands described in the Quapaw treaty are excluded by this test; they could not have been so settled and cultivated prior to the date of that law, because the Indian title had not been extinguished. The treaty of 1818, *is a solemn recognition of that title, which neither the United States, nor any one claiming under them,*

*is at liberty to dispute; and so long as it existed, all settlements made on those lands, were in contravention of the rightful claims of other persons,* that is to say, of the Quapaw Indians.

I am, &c.,
B. F. BUTLER.

To the SECRETARY OF THE TREASURY.